

September 9, 1999
DO-99-035

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Section 208 Exemptions for Disqualifying Financial
Interests that are Implicated by Participation in OMB
Circular A-76 Procedures

A recent decision by the Comptroller General has generated several inquiries about the applicability of the exemption under 5 C.F.R. § 2640.203(d) for employees who evaluate contractor proposals for procurements conducted under Office of Management and Budget (OMB) Circular A-76 procedures.(1) In that decision, fourteen of the sixteen employee evaluators held positions that were subject to being contracted out. The employees evaluated the technical proposals of contractors who were offering to perform the maintenance, operation, repair and minor construction services currently performed in-house by the Government employees. A total of 495 employees worked in the affected component. The Comptroller General concluded that it was a conflict of interest for the affected employees to participate in the evaluation of the contractor proposals, citing various provisions of the Federal Acquisition Regulation (FAR).

The Comptroller General decision did not address the Office of Government Ethics (OGE) exemption under 18 U.S.C. § 208 for employees who participate in particular matters where the disqualifying financial interest arises from Federal Government employment. We are issuing this Memorandum to reaffirm the applicability of the exemption at 5 C.F.R. § 2460.203(d) for employees who participate in matters conducted under OMB Circular A-76 procedures.(2) The Federal Acquisition Regulation at 48 C.F.R. § 3.101-1 requires that:

[g]overnment business be conducted in a manner that is above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree

of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions. [underscoring supplied]

While the Comptroller General opinion cited part of this FAR provision as a basis for the decision, it did not include or discuss the first sentence of the provision. Additionally, although raised by the attorney representing the Department of the Air Force, the opinion made no mention in the decision concerning the conflict of interest statute in 18 U.S.C. § 208 nor of the exemptions that OGE has issued by regulation implementing that statute. We believe that these were significant omissions that may well have affected the conclusion in that case.

Unless permitted by 18 U.S.C. § 208(b)(1)-(4), an employee is prohibited by 18 U.S.C. § 208(a) from participating personally and substantially in an official capacity in any particular matter in which to his knowledge, he, or any other person specified in the statute, has a financial interest, if the particular matter will have a direct and predictable effect on that interest. A "particular matter" includes evaluation of contract bids or proposals. An employee who evaluates bids or proposals of contractors who are offering to perform the work that the employee performs in-house is participating personally and substantially in a particular matter that will have a direct and predictable effect on his financial interest. In the absence of an exemption or an individual waiver, the employee could not evaluate such bids or proposals without violating Section 208(a).

In accordance with 18 U.S.C. § 208(b)(2), OGE has provided an exemption for such employees who participate in particular matters where the disqualifying financial interest arises from Federal Government employment. While an employee may not make determinations that would individually and specially affect his own salary and benefits, the exemption does permit an employee to make determinations that would affect an entire office or group of employees, even though the employee is a member of that group. Under those circumstances, employees who participate in matters connected with OMB A-76 procedures, including the evaluation of bids or proposals, are not in

violation of Section 208(a). As noted in 5 C.F.R. § 2635.501, a determination that an exemption in 5 C.F.R. § 2640 applies also constitutes a determination under the standards of conduct that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

Employees who participate in A-76 procedures, however, should be reminded of other conflict of interest provisions that may apply in Title 18 of the United States Code, in the standards of ethical conduct at 5 C.F.R. part 2635, and in the procurement integrity provisions at section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. § 423) and its implementing regulations at 48 C.F.R. § 3.104.(3) For this reason, and because we anticipate that conflict of interest issues will arise more frequently as A-76 efforts increase, we ask that you share this Memorandum with procurement officials at your agency and with those involved in the implementation of A-76 procedures.

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1. The decision was DZS/Baker LLC; Morrison Knudsen Corporation, B-281224, January 12, 1999.
 2. We address in this Memorandum only our interpretation of 18 U.S.C. § 208 and the exemption at 5 C.F.R. § 2640.403(d) that is authorized by 18 U.S.C. § 208(b)(2). This Memorandum does not purport to interpret OMB Circular A-76 nor the Revised Supplemental Handbook to OMB Circular A-76.
 3. For a fuller discussion of these restrictions, see OGE Informal Advisory Letter 95 x 10 (originally published as an article in the Government Ethics Newsgram, Summer 1995, entitled "Privatization Issues Affect Federal Employees," Vol. 12, No. 2, pp. 1-3).